

September 27, 2006

To United States Senators and Members of Congress

Dear Senators and Representatives:

We, the undersigned law deans and professors, write in our individual capacity to express our deep concern about two bills that are rapidly moving through Congress. These bills, the Military Commissions Act and the National Security Surveillance Act, would make the indefinite detention of those labeled enemy combatants and the executive's program of domestic surveillance effectively unreviewable by any independent judge sitting in public session. While different in character, both bills unwisely contract the jurisdiction of courts and deprive them of the ability to decide critical issues that must be subject to judicial review in any free and democratic society.

Although the Military Commissions Act of 2006 (S. 3929/S. 3930) was drafted to improve and codify military commission procedures following the Supreme Court's June 2006 decision in *Hamdan v. Rumsfeld*, it summarily eliminates the right of habeas corpus for those detained by the U.S. government who have been or may be deemed to be enemy combatants.¹ Detainees will have no ability to challenge the conditions of their detention in court unless and until the administration decides to try them before a military commission. Those who are not tried will have no recourse to any independent court at any time. Enacting this provision into law would be a grievous error. As several witnesses testified before the Senate Judiciary Committee on Monday, Article I, Section 9 of the Constitution specifies that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it," conditions that are plainly not satisfied here.

Similarly, the National Security Surveillance Act of 2006 (S. 3876) would strip courts of jurisdiction over pending cases challenging the legality of the administration's domestic spying program and would transfer these cases to the court established by the Foreign Intelligence Surveillance Act of 1978 (FISA).² The transfer of these cases to a secret court that issues secret

¹ Section 6 would replace subsection (e) of Section 2241 of Title 28 of the United States Code with the following: "(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who—(A) is currently in United States custody; and (B) has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." Military Commissions Act of 2006 (S. 3930). Subsection (e)(2) would deprive courts of "jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien detained by the United States" who meets these conditions, except as provided in the Detainee Treatment Act of 2005. *Id.* These provisions appear in Section 106 of S. 3929.

² Section 702(b)(1) of that bill currently provides: "In any case before any court challenging the legality of classified communications intelligence activity relating to a foreign threat, including an electronic surveillance program, or in which the legality of any such activity or program is in issue, if the Attorney General files an affidavit under oath that the case should be transferred to the Foreign Intelligence Court of Review because further proceedings in the originating court would harm the national security of the United States, the originating court shall transfer the case to the Foreign Intelligence Surveillance Court of Review for further proceedings under this subsection." National Security Surveillance Act of 2006 (S. 3876).

decisions would shield the administration's electronic surveillance program from effective and transparent judicial scrutiny.

These bills exhibit a profound and unwarranted distrust of the judiciary. The historic role of the courts is to ensure that the legislature promulgates and the executive faithfully executes the law of the land with due respect for the rights of even the most despised. Any protections embodied in these bills would be rendered worthless unless the courts can hold the executive accountable to enacted law. Moreover, the bills ignore a central teaching of the Supreme Court's decision in *Hamdan v. Rumsfeld*: the importance of shared institutional powers and checks and balances in crafting lawful and sustainable responses to the war on terror. Absent effective judicial review, there will be no way to enforce any of the limitations in either bill that Congress is currently seeking to place upon the executive's claimed power.

We recognize the need to prevent and punish crimes of terrorism and to investigate and prosecute such crimes. But depriving our courts of jurisdiction to determine whether the executive has acted properly when it detains individuals in this effort would endanger the rights of our own soldiers and nationals abroad, by limiting our ability to demand that they be provided the protections that we deny to others. Eliminating effective judicial review of executive acts as significant as detention and domestic surveillance cannot be squared with the principles of transparency and rule of law on which our constitutional democracy rests.

The Congress would gravely disserve our global reputation as a law-abiding country by enacting bills that seek to combat terrorism by stripping judicial review. We respectfully urge you to amend the judicial review provisions of the Military Commissions Act and the National Security Surveillance Act to ensure that the rights granted by those bills will be enforceable and reviewable in a court of law.

Sincerely,³

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